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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1887

JOSEPH A. TRIANO,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

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THE STATE OF NEW JERSEY,

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PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

The Petitioner, Joseph Triano, respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of New Jersey denying petitioner's Petition for Certification entered in this proceeding on April 30th, 1974.

Opinion Below

The opinion of the Appellate Division of the State of New Jersey appears in the Appendix hereto. No opinion was rendered by the Supreme Court of New Jersey.

Jurisdiction

The judgment of the Supreme Court was entered on April 30th, 1974. This Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1257 (3).

Question Presented

Whether the rule of collateral estoppel as embodied in the double jeopardy provision of the Fifth Amendment is binding on the State of New Jersey?

Statement of Matter Involved

A three count indictment was returned against Joseph Triano, Deputy Clerk of the Criminal Division of the Hudson County District Court. The first count alleged that Joseph Triano committed bribery by accepting one hundred dollars from Abraham Chasnoff. It was alleged that the one hundred dollars was given because Joseph Triano represented that he could obtain a certain disposition of those charges pending against a James Cairns. The second count of the indictment alleged that the receipt of the one hundred dollars constituted the crime of extortion. The third count of the indictment alleged that Joseph Triano committed three acts of misconduct in office: by representing that he would obtain a favorable disposition of the charges of James Cairns; by amending the summons of James Cairns; by accepting the $100.00. As is self evident, two of the alleged acts of misconduct are the same alleged acts of bribery and extortion in the first two counts. The jury returned a verdict of not guilty on the charges of bribery and extortion and was unable

to agree concerning the misconduct in office. Subsequently upon motion, Judge Young of the Hudson County Court examined the record of the first trial and determined that in order to obtain a conviction it would be necessary for a jury to decide certain issues in favor of the state that had already been resolved in Joseph Triano's favor during the previous trial. Judge Young then dismissed the third count of the indictment. The Appellate Division in an opinion that did not analyze or examine the issues presented at the first trial reversed the third count and ordered a plenary [sic] trial.

During a trial, Abraham Chasnoff an attorney testified that a James Cairns had been referred to him through the office of another attorney in Kearny (1T2-4 to 23). James Cairns had been charged with drunk driving and failure to obey the signal of an officer (1T6-24 to 1T7-11). According to Chasnoff, on June 25th he received a message that Joseph Triano had called. On June 28th, Joseph Triano called again (1T14-8 to 12). Chasnoff testified that Joseph Triano, who was the Deputy Clerk of the Hudson County District Court, Criminal Division, told him that the case had been scheduled for a later date because the officers were mad at his client, and were reluctant to downgrade it. Prior to this telephone call Abraham Chasnoff had never met nor spoken to Joseph Triano.

On November 5th, according to Abraham Chasnoff, he met in Joseph Triano's office where Joseph Triano allegedly told him that he had been able to convince the officers to downgrade the case from "a" to "b" and that Abraham Chasnoff would have to "bag" them $50. a piece (1T25-24 to 1T26-1). Chasnoff claimed he did not know what the word "bag" meant (1T26-2 to 3). The money for the officers was supposed to be given to Joseph Triano

in an envelope (1T27-2 to 19). At the time of this alleged conversation there were five to seven other persons present in the room (3T1-5). No attempt was made to call these persons as witnesses.

On November 15th, Abraham Chasnoff went to the office of the Prosecutor's investigators and telephoned Joseph Triano. Attached to the telephone was a recording device that had been installed by the investigators (1T42-1 to 21; 5T14-4). On November 24th, Abraham Chasnoff went to the Administration Building where the investigators fitted him with a concealed recording device (1T50-2 to 25). Chasnoff was also given an envelope with a hundred dollar bill in it (1T52-10). Detective Flannery had initialled the hundred dollar bill and recorded its serial number (5T10-14).

Abraham Chasnoff then went to Joseph Triano's office. Joseph Triano told him that everything was straightened out and he was going to speak to Judge McCole in chambers, and the offense was going to be handled as a "b" offense (1T58-1 to 16). In addition the offense of failure to stop for an officer's signal was to be merged with the other offense (1T59-19). Joseph Triano allegedly told Chasnoff that the judge would accept the plea without the officers being present (1T60-17 to 18). According to Chasnoff, Triano said he would see the judge to decide if he wanted to take the matters in chambers (4T108-19 to 23). Joseph Triano also allegedly said he would tell the judge what the fine would be (4T113-187). Abraham Chasnoff then gave the envelope to Joseph Triano who held it up to the light, folded it twice and put it in the top left hand drawer of the safe (1T63-19 to 1T64-5). During all this time there were possibly twelve other persons in the room (4T60-22 to 23).

Judge McCole of the Hudson County District Court was the judge who was handling the traffic calendar on November 24th. He was called as a defense witness. He presented a procedure that was quite contrasting to that depicted in the alleged conversation between Chasnoff and Joseph Triano. He testified that prior to November 24th, 1971 he had no knowledge concerning the case of *State* v. *James Cairns* (11T52-14 to 18). He testified that he never spoke to anyone about downgrading the summons relating to James Cairns (11T55-2 to 6). Judge McCole described how downgrading only occurs after a consultation between the prosecutor and the person charged with the offense, and then the Court must agree with the suggestion (11T 57-1 to 7). Judge McCole also said he would only dispose of the case in open Court (11T58-6). Judge McCole went on to state that there is no determination of what the fine would be until the defendant appears before the judge (11T69-20 to 22). In addition the court indicated that he would never have disposed of these particular tickets unless the officers were present (11T102-3 to 8). Judge McCole also stated that he would not have merged these two tickets (11T58 to 11T61-20).

Abraham Chasnoff testified that after giving the ticket to Joseph Triano he left his office and met Captain St. Pierre and Detective Flannery and told them where the envelope had been placed (1T67-11). After placing Joseph Triano under arrest, Flannery went into the Violations Bureau safe in an attempt to find the white envelope, but was not able to locate it until he left the office and had another conversation with Abraham Chasnoff (5T40-6 to 11). When he did find the envelope, it was in a pile of other summons that had money attached to pay the assessed fines (5T107-5 to 9).

Patrolman Norman Sierfeld of the Hudson County Police Department was called by the state. He testified that on June 1, 1971, he arrested James Cairns for driving while under the influence of intoxicating liquors (8T7-23 to 25; 11T8-12 to 11T9-9). This was in addition to the summons for failing to obey the officers signal. Patrolman Sierfeld testified that two copies of the summons that he issued on that date had been altered (11T14-6 to 9). These two copies had a "b" added after the statutory violation (11T14-20 to 22). The patrolman testified that from the date he issued the summons until the date that Joseph Triano was arrested, he never saw the summonses (11T14-20 to 11T20-1). The patrolman indicated that lowering the charge from "a" to "b" was commonly done and he believed that he had the authority to lower it (11T37-8 to 11).

Ordway Hilton, a handwriting specialist was called as an expert witness by the State (9T84-9 to 25). He examined the handwriting samples of the defendant Joseph Triano as well as the summons that were the subject matter of this criminal prosecution and he performed various scientific tests (9T90-2 to 9T92-11). This expert witness said he was unable to identify the "b" as having been written by Joseph Triano (9T94-10 to 13). Mr. Hilton was also unable to say that Officer Sierfeld did not put the "b" on the copies of the summons (9T113-16 to 18).

Margaret Prendergast, the principal clerk of the Hudson County District Court prior to November 24th, 1971, and presently the Acting Deputy Clerk of the District Court, testified about the procedure of that court.

She testified that the safe where the police found the envelope was opened at the beginning of the business day at about quarter to nine. Three people could open the

safe and it then remained open all day (9T22-1 to 9). At the time of the arrest of Joseph Triano, fourteen persons were working in that room (9T22-20). Each of these employees had access to the safe (9T23-21). Captain Edmund L. Burke, Inspector of the Hudson County Police Department testified on behalf of the State about the procedure employed by that police department. During the trial numerous character witnesses were called on behalf of Joseph Triano and the jury listened to the taped conversations.

After weighing the testimony the jury concluded (1) that the state had not proved that Joseph Triano had represented that he would obtain a certain disposition of the case of James Cairns and (2) that Joseph Triano did not receive the $100 as a bribe. Consequently, the jury found Joseph Triano not guilty of bribery and extortion. The jury did not reach a verdict on the charge of misconduct.

REASONS FOR GRANTING THIS WRIT

The courts in New Jersey have refused to follow the United States Supreme Court and other federal court decisions concerning collateral estoppel.

There are no cases in New Jersey which involve the question of whether collateral estoppel is applicable to bar the relitigation of an issue where the jury has returned a verdict of not guilty on some counts of an indictment, but has been unable to agree on another count of the indictment. At this point in the development of the law there is no longer any question that the double jeopardy provision of the Fifth Amendment is binding on the states. *Benton* v. *Maryland,* 395 U. S. 784 (1969). This

is acknowledged now in New Jersey, *State* v. *Ebron*, 61 N. J. 207, 215 (1972). The rule of collateral estoppel is embodied in the Fifth Amendment guarantee against double jeopardy, *Ashe* v. *Swenson*, 397 U. S. 436 (1970). If the issues which the state wished to litigate have already been determined in the first trial, a subsequent trial is barred. In order to resolve this question inquiry must be made into the issues which the first jury had to resolve in reaching its judgment. This requires a canvassing of the record of the first trial. *Scalfon* v. *United States*, 332 U. S. 575, 579 (1947). The New Jersey Court in its opinion failed to examine the record of the first trial to determine what issues were resolved by the jury. This failure is a result of the fact that the Court's opinion is based upon a false premise. The false premise is that the doctrine of collateral estoppel never can apply when a jury has returned a verdict of not guilty on some counts of the indictment but did not agree on the remaining counts of the indictment.

The decision of the New Jersey Courts in this case displays a lack of understanding of the doctrine of collateral estoppel. A determination of the applicability of collateral estoppel can not be made without an examination of the record of the trial. Unlike the trial court, the Appellate Division of New Jersey did not review the record of the trial. This examination of the record must be made to determine what issues were resolved by the jury in its verdict of not guilty. The analysis that is lacking in the Appellate Division decision has been made by the courts in other jurisdictions. In *United States* v. *Flowers*, 255 F. Supp. 485 (E.D. N.C. 1966), the jury found the defendant not guilty of thirteen counts of the indictment and could not agree on thirteen other counts. The court held at p. 489:

> "I conclude on the basis of the available authority that the defense of collateral estoppel as to any facts which were necessarily determined in the defendant's favor by the verdict on the counts determined by the first trial, is open to the defendant upon a retrial of the counts on which the jury failed to agree."

In *Cosgrove* v. *United States*, 224 F. 2d 146 (9th Cir. 1954), the jury found the defendant Cosgrove not guilty of two counts of the indictment and disagreed on the three remaining counts. The court held that the issues were so nearly identical that the doctrine of collateral estoppel applied. In *Oliver* v. *Superior Courts*, 267 P. 764 (Dist. Ct. Cal. 1928) the jury acquitted the defendant of thirty-three counts of the indictment and could not agree on the remaining count. The court reviewed the evidence and dismissed the remaining count. It found that in order to obtain a conviction on that count the state would have to prove some of the acts that had been alleged in the counts which the jury acquitted the defendant. This holding was followed in the later case of *People* v. *Beltran*, 210 P. 2d 238, 243 (Dist. Ct. App. Cal. 1949). Collateral estoppel was also applied in a similar manner in the cases of *United States* v. *Armco Steel Corp.*, 252 F. Supp. 364 (S.D. Cal. 1966), and *United States* v. *Simon*, 225 F. 2d 260 (3rd Cir. 1955).

All these cases demonstrate that the issue of collateral estoppel and its application in the particular case cannot be determined in the abstract as the state has attempted. An examination of the trial record must be made. This examination was correctly made by Judge Young in deciding the motion in this case.

The Appellate Division of New Jersey without examining the merits of the Federal cases cavalierly dismissed

these cases by stating "it did not consider these cases binding upon us." (Sa7-15).

The Appellate Court relied on the earlier New Jersey case of *State* v. *Roller*, 29 N. J. 339 (1959). *State* v. *Roller*, supra 345, relied upon the case of *State* v. *Hoag*, 21 N. J. 496 (1956) affirmed 356 U. S. 464 (1957). *State* v. *Hoag*, supra had been discredited by the United States Supreme Court in *Benton* v. *Maryland*, supra and *Ashe* v. *Swenson*, supra.

In making an examination of the record the doctrine of collateral estoppel should not be applied grudgingly. The primary considerations should be fairness and the fulfillment of reasonable expectations in light of the constitutional and common law goals. See *Sealfon* v. *United States*, supra.

Perhaps the most glaring deficiency of the Appellate Division of New Jersey's opinion is its failure to even examine the allegations of the indictment. A mere reading of the allegations manifests the striking similarities between those counts of the indictment on which the jury returned a verdict of not guilty and the third count of the indictment. The first count alleges that the defendant did receive the sum of $100.00 "in cash as a bribe, present or reward from Abraham J. Chasnoff, an attorney-at-law of the State of New Jersey, which bribe was accepted pursuant to defendant's undertaking and representation made to said Abraham J. Chasnoff, that defendant, by reason of his said public office, would obtain a certain disposition of certain charges then pending in the Hudson County District Court against one James M. Cairns."

Comparing the misconduct count which the state seeks to relitigate, the very first act alleges the undertaking by the defendant to effect the disposition of the charges against the same James M. Cairns by means of the pay-

ment of cash monies supplied by the same Abraham Chasnoff.

The second count of the indictment on which the jury also found Joseph Triano not guilty charged that he had unlawfully and by color of his office as Deputy Clerk, did receive from Abraham Chasnoff a fee and reward in the approximate amount of One Hundred Dollars in cash, the same not allowed by law for performing his duties.

In striking similarity to the second count, the third alleged act of misconduct charges that the defendant, as Deputy Clerk of the Criminal Division of the District Court, ". . . did accept and receive the sum of One Hundred Dollars ($100.00) in cash from one Abraham J. Chasnoff, . . . in exchange for the undertaking of defendant Triano to influence and control the disposition of said criminal action in a manner favorable to James M. Cairns as aforesaid."

As Judge Young the trial Judge who was reversed noted:

> "The parallel of the terms of the alleged third specific act of misconduct with the terms of the charge pertaining to unlawful taking clearly established an identity of issues comprising the same or similar facts which make up both accusations." (Sa15-10 to 14).

Analytically the identity of issues between what the jury had already decided and what the state seeks to relitigate can be demonstrated by reviewing the evidence presented at the trial.

The jury heard four days of testimony from Chasnoff concerning the corrupt bargain as alleged (1T1 to 4T). It also heard testimony from the Prosecutor's staff, con-

cerning the monitoring electronically of conversations between the defendant and Chasnoff arranging the alleged illegal undertaking and the consummation of same (5T14-4). Moreover, the Jury heard relevant portions of two tape recordings of the conversations which had been monitored. There was also received into evidence a one hundred dollar bill, accompanied by testimony that the bill had been marked. There was testimony that the marked bill had been supplied to Chasnoff, who gave it to the defendant. The bill was then retrieved from a safe located near the defendant's desk in his office (5T10-14; 5T107-5 to 9). This is the same evidence that the state used to prove the first and third acts of misconduct.

A further analysis of the second alleged act of misconduct demonstrates that it is encompassed by the two counts of the indictment. This alleged act of misconduct asserts that Joseph Triano unlawfully and improperly amended and changed the summons from the charge of driving an auto while under the influence of alcohol, N.J.S.A. 39:4-50 (a) to the lesser offense of driving while impaired N.J.S.A. 39:4-50 (b). Judge Young correctly noted:

> "The corrupt bargain which constituted the state's case on the bribery count centered around the alleged undertaking on the part of the defendant to obtain a certain disposition of certain charges in the Hudson County District Court against one, James Cairns . . . Likewise, the unlawful taking charge in the second count was tried in the context of 'a criminal action pending before the Criminal Division of the Hudson County District Court' in the words of that Count. The charges and the criminal action have references to a Summons No. CA52000 which charged driving while intoxicated, N.J.S.A. 39:4-50 issued to James Cairns." (Sa16-24 to Sa17-8).

The evidence produced by the state to establish the guilt of the defendant on the bribery and extortion charges involved the amendment of the ticket. Norman Sierfeld who issued the ticket denied seeing it from the date it was issued until Joseph Triano was arrested (11T 14-20 to 11T20-1). Margaret Prendergast formerly the principal clerk of the District Court testified about the procedure relating to the processing, docketing and controlling summons (9T9-11 to 9T16-24). Ordway Hilton, a handwriting expert testified; he was unable to state that the "b" was written by the defendant (9T94-10 to 13). He also testified that from his analysis he was unable to either exclude Officer Sierfeld or the defendant from being the person who had written the "b" (9T113-16 to 18). Judge McCole testified that the Deputy Clerk did not have authority to alter a traffic summons (11T57-1 to 7), and that he had not approved of the amendment to the ticket in question (11T52-15). Judge Young then concluded:

> "A content analysis of the evidence adduced by the State, both quantitatively and otherwise, directed to the counts of bribery and unlawful takings, distinctly put in issue the allegations that defendant Triano unlawfully and improperly amended the summons. Indeed, it could be said that the unlawful tampering of the summons and the alleged unlawful manner in which the summons was processed by the defendant, constituted the core of the State's case. The accusatory act of tampering with the summons formed an integral part and necessary ingredient of the offense charged, and supplied a quid pro quo of the alleged bribe and extortion. On those charges the defendant was exonerated.

The prosecutor at the time of the motion acknowledged that at a new trial substantially the same evidence would be presented again (Da1; Sa19-24 to Sa20-2).

There is added force to the principles announced in *State* v. *Cormier,* supra, 509.

> "The broadening policy considerations in favor of safeguarding individual rights of defendants and the need for conserving public energies as well as public funds, strongly suggest that where, as here, a jury has considered and rejected the State's contention in favor of the defendant's contention on the issue submitted as the crucial one, the matter should be permitted to rest in its entirety."

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment of the Supreme Court of New Jersey.

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APPENDIX A

Opinion of the Superior Court of New Jersey Law Division—Hudson County (Criminal)

(Filed—January 22, 1973.)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—HUDSON COUNTY

(Criminal) Indictment No. 326-71

STATE OF NEW JERSEY,

vs.

JOSEPH A. TRIANO,

Defendant.

Argued December 22, 1972. Decided January 22, 1973.

Miller, Hochman, Meyerson & Miller, attorneys for the Defendant, *Leonard Meyerson,* appearing.

Honorable Geoffrey Gaulkin, Prosecutor for the County of Hudson, for the State of New Jersey, *Norman Kline,* Assistant, appearing.

YOUNG, J.S.C. t/a

On October 20, 1972, following a trial of three weeks, the Jury reported verdicts of acquittal on the First

Appendix A

Count of the Indictment which charges bribery, N.J.S.A. 2A:93-6, and on the Second Count which charges unlawful takings of a fee or reward, N.J.S.A. 2A:105-1. The Jury reported a disagreement on the Third Count which charges three specific acts of misconduct in office, N.J.S.A. 2A:85-1. A declaration of mistrial was made as to that Count. Defendant now pleads the doctrines of double jeopardy, *res judicata,* and collateral estoppel in his motion for an order dismissing the Third Count.

The motion invokes aspects of constitutional law, Federal and State, the principles of double jeopardy, *res judicata,* and collateral estoppel; decisional law, Federal and State; as well as the application of the total body of this jurisprudence to the record compiled over which this court presided.

The area of double jeopardy and *res judicata* has not only been the subject of extensive legal bibliography, but in the words of Mr. Justice Proctor, "the subject of a great deal of confusion in the criminal law." *State* v. *Bell,* 55 N. J. 239, 243 (1970); see Note, "Collateral Estoppel in Criminal Cases—A Supplement to the Double Jeopardy Protection," 21 *Rutgers L. Rev.* 274, 287, 288 (1967) in which the author concludes his survey with the words, "However, decisions involving double jeopardy have been irreconciliable and generally confusing."; Note, "Statutory Implementation of Double Jeopardy Clauses; New Life For a Moribund Constitutional Guarantee," 65 *Yale L. J.* 339, 344 (1956) in which the author states a similar conclusion: ". . . [C]urrent court decisions in this area are hopelessly irreconciliable."; Note, Lugar, "Criminal Law, Double Jeopardy and Res Judicata," 39 *Iowa L. Rev.* 317 (1954).

The confusion in applying these principles is attributable in part to the common law courts. At common law and immediately following the adoption of the Constitution, "one criminal act or a series of acts in a single plan was likely to yield only one offense." Mayers and Yarbrough, "*Bis Vexari*: New Trials and Successive Prosecutions," 74 *Harv. L. Rev.* 1, 29 (1960). Moreover, the common law courts did not distinguish between the "legal theory of an offense and the underlying factual transaction." Note, 65 *Yale L. J., supra,* at 342, cited in Comment, "Constitutional Law—Double Jeopardy—Successive Prosecutions for a Single Transaction as a Violation of the Due Process Clause," 20 *Rutgers L. Rev.* 631, 638 (1965).

In more recent years, the doctrine of collateral estoppel has reached constitutional dimensions in its application. The most recent pronouncements of the United States Supreme Court interpreting and applying double jeopardy and collateral estoppel have been collated by Mr. Justice Mountain for a unanimous New Jersey Supreme Court in *State* v. *Ebron,* 61 N. J. 207 (1972), from which the passage which follows is drawn:

> "The Fifth Amendment of the Federal Constitution says, '. . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb,' while Article I, paragraph 11 of our State Constitution provides that '[n]o person shall, after acquittal, be tried for the same offense.' Despite the dissimilarity in the language of these provisions, they have come to be recognized as substantially coextensive in principle and scope. *State* v. *Farmer,* 47 N. J. 145, 168 (1966), *cert.* den. 386 U. S. 991, 87 S. Ct. 1305, 18 L. Ed. 2d 335 (1967);

> *State* v. *Williams*, 30 N. J. 105, 122 (1959). Furthermore it is now settled that through the Fourteenth Amendment the double jeopardy provision of the Fifth Amendment is binding on the states, *Benton* v. *Maryland*, 395 U. S. 784, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969).
>
> In *Ashe* v. *Swenson*, 397 U. S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970) the Supreme Court defined collateral estoppel as meaning simply 'that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.' U. S. at 443, 90 S. Ct. at 1194, 25 L. Ed. 2d at 475. It went on to hold, for the first time, that the rule of collateral estoppel is embodied in the Fifth Amendment guarantee against double jeopardy. Thus a defendant urging collateral estoppel is now projecting an argument of constitutional dimension. Compare *State* v. *Cormier*, 46 N. J. 494, 505 (1966)." 61 N. J. at 214-215.

Among the distinctive principles of law declared by the United States Supreme Court in the cases cited by Mr. Justice Mountain are these: that collateral estoppel is now part of the constitutional protection against double jeopardy, and that in applying the principle of collateral estoppel, the "issue of ultimate fact" which has been determined by a valid judgment becomes the operative concept.

The guidelines of the scope of the inquiry were established by the Supreme Court in *Ashe* v. *Swenson*, 397 U. S. 436, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970):

> "Where a previous judgment of acquittal was based upon a general verdict . . . [The rule of collateral estoppel] requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'" 397 U. S. at 444, 90 S. Ct. at 1194, 25 L. Ed. 2d at 475-476, citing Mayers and Yarborough, *supra*, 74 *Harv. L. Rev.* 1, 38-39.

Earlier, in the leading case of *Sealfon* v. *United States*, 332 U. S. 575, 579, 68 S. Ct. 237, 240, 92 L. Ed. 180, 184 (1947), the Supreme Court in delineating the scope of the review when collateral estoppel is invoked noted that "The instructions under which the verdict was rendered, however, must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings. We look to them only for such light as they shed on the issues determined by the verdict."

Accordingly, in disposing of the pending motion, the inquiry in canvassing the record and considering "all the circumstances of the proceedings" must be "issue" oriented, which in turn calls for the isolation of the constituent facts embraced within the issue. The Supreme Court of New Jersey in *State* v. *Ebron*, *supra*, 61 N. J. 207 (1972) endorsed both the frame of reference as well as the procedure here outlined, having earlier rejected strict adherence to the "same transaction" test, the "lesser included offense" and the "same evidence" test. See also *State* v. *Currie*, 41 N. J. 531, 539 (1964), in which the Court pointed out that in weighing double jeopardy: "The

primary considerations should be fairness and fulfillment of reasonable expectations in the light of the constitutional and common law goals."

Prior to *State* v. *Ebron, supra*, 61 N. J. 207 (1972), the judicial bench marks in this area of the law were carved by the Supreme Court in *State* v. *Hoag*, 21 N. J. 496 (1956), *aff'd. sub. nom. Hoag* v. *New Jersey*, 356 U. S. 464, 78 S. Ct. 829, 2 L. Ed. 2d 913 (1958), *reh. den.* 357 U. S. 933, 78 S. Ct. 1366, 2 L. Ed. 2d 1375 (1958). Hoag had been acquitted of the charge of armed robbery of three alleged victims named in three indictments which were consolidated for trial. A subsequent indictment charged Hoag with armed robbery at the same place on the same day, but named a fourth alleged victim. This time the jury returned a verdict of guilty. Hoag had interposed an alibi at the earlier trial which resulted in his acquittal. On appeal to the New Jersey Supreme Court the plea of double jeopardy was rejected. The Court applied the "same evidence" test and concluded that the subsequent indictment did not charge "the same offence" as that term is used in Article I, paragraph 11 of the State Constitution for the reason that a different alleged victim was named. Additionally, Hoag's plea that the retrial "offends fundamental justice" did not avail him. Mr. Justice Heher filed a dissent, urging concepts which were later to receive the approbation of the Court. The essence of Mr. Justice Heher's opinion is set out in the sentence, "Where the 'fact prosecuted' is the same in both prosecutions, though the offenses differ in 'coloring and degree,' there is prior jeopardy." *State* v. *Hoag, supra*, 21 N. J. at 510, citing *State* v. *Cooper*, 13 N. J. L. 361 (Sup. Ct. 1883).

Appendix A

Criticism of the reasoning and conclusion in the *Hoag* case in *State* v. *Cormier,* 46 N. J. 494, 507-508 (1966), presaged a contrary result. Indeed, more recently a judgment has been entered in the *Hoag* case in the form of post-conviction relief granted by Judge Simpson. See *State of New Jersey* v. *William Hoag,* Superior Court, Law Division, Bergen County, Indictment No. 17966, unpublished opinion of November 29, 1972, which applied the standards and reached the result urged by Mr. Justice Heher in his dissent. In the light of *State* v. *Cormier, supra,* 56 N. J. 494 (1966), *State* v. *Bell, supra,* 55 N. J. 239 (1970), and *State* v. *Ebron, supra,* 61 N. J. 207 (1972), as well as *Ashe* v. *Swenson, supra,* 397 U. S. 439, 90 S. Ct. 1189, 25 L. Ed. 2d 469 (1970), the judicial pendulum has inscribed an arc so sweeping in this sector of our jurisprudence that the viability of earlier determinations must be reexamined.

In the three-count Indictment under review, the same circumstances form the background of the respective charges of bribery, unlawful takings and misconduct in office. Defendant, Joseph A. Triano, while Deputy Clerk of the Criminal Division of the District Court of Hudson County, a public office, was allegedly approached by an attorney at law, Abraham J. Chasnoff, on behalf of his client, James M. Cairns, who had been given a summons for driving while intoxicated, N.J.S.A. 39:4-50. The alleged acceptance by the Defendant of the sum of one hundred dollars was said to be in exchange for his undertaking and representation made to Chasnoff that he, the Defendant, would use his public office to obtain a certain disposition of the criminal charges then pending against Cairns, namely by amending the summons to charge the lesser offense of driving while impaired, N.J.S.A. 39:4-50 (b) and by having a plea to the lesser offense accepted.

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In summary, the criminal action pending against Cairns, and the alleged prostitution of his office by the Defendant in processing the action, form the substance of each and every one of the three counts.

In making an analysis of the specific charges framed in the three counts of the Indictment, the Third Count will provide the point of departure. The record will be canvassed for the evidence, the charge, and other relevant matter in order to isolate the issues adjudicated and the issues which survive, if any. The Third Count alleges, in relevant part, that the Defendant during November 5, 1971 and November 24, 1971,

> ". . . willfully, maliciously and corruptly violated his duty to the public, to faithfully, impartially, fairly and justly treat, manage, and process all criminal complaints and summonses in the Hudson County District Court, in exercising the duties of the public office of Deputy Clerk of the Criminal Division of the Hudson County District Court, and did misperform and misconduct duties of his said office, as the same related to the case of State of New Jersey vs. James M. Cairns, an action then and there pending in the Hudson County District Court, by undertaking to process, dispose of, and deal with said case in an unfair, partial and unjust manner, by committing the following respective acts of misconduct:
>
> 1. Defendant Triano did represent and state to said Abraham J. Chasnoff, in connection with the said criminal action pending against James M. Cairns, that defendant Triano would obtain the consent of the two police officers who initiated the said criminal action to a disposition of

said criminal action favorable to James M. Cairns, by means of payment of cash monies (to be supplied by Abraham J. Chasnoff to defendant Triano) to said police officers;

2. Defendant Triano did, in connection with said criminal action against James M. Cairns, unlawfully and improperly amend and change Summons No. CA52000 of the Hudson County District Court in the following manner: The Summons, as filed, alleged that James M. Cairns violated the provisions of N.J.S. 39:4-50; defendant Triano unlawfully, and without authority, did amend said Summons to allege a violation of a lesser offense, N.J.S. 39:4-50-B;

3. Defendant Triano did accept and receive the sum of One Hundred Dollars ($100.00) in cash from one Abraham J. Chasnoff, a New Jersey attorney, then and there representing said James M. Cairns, in exchange for the undertaking of defendant Triano to influence and control the disposition of said criminal action in a manner favorable to James M. Cairns as aforesaid; all being contrary to the provisions of N.J.S. 2A:85-1, against the peace of this State, the Government and dignity of the same."

The core of the specific act of misconduct first enumerated is the alleged undertaking by the Defendant to effectuate the disposition of a pending criminal action by means of the payment of cash monies to be supplied by one Chasnoff, to the Defendant. The First Count, in comparison, alleged that the Defendant did receive the sum of $100.00 "in cash as a bribe, present or reward from

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Abraham J. Chasnoff, an attorney-at-law of the State of New Jersey, which bribe was accepted pursuant to defendant's undertaking and representation, made to said Abraham J. Chasnoff, that defendant, by reason of his said public office, would obtain a certain disposition of certain charges then pending in the Hudson County District Court against one James M. Cairns, . . ." In addition to a comparison of the respective recitals of the allegations, the court has resorted to extensive trial notes pertaining to these specific allegations as well as to the charge. As to the latter, the elements of the crime of bribery, as charged, included the receipt of any undue reward by a public officer designed to influence his behavior in office and to incline him to act contrary to the known rules of honesty and integrity. The charge of the elements of the crime of bribery, here succinctly stated, was supplemented with the instructions on the element of criminal intent.

Reserving consideration of the second specific act of misconduct, the third specific act alleges, in relevant part, that the Defendant, as Deputy Clerk of the Criminal Division of the District Court, ". . . did accept and receive the sum of One Hundred Dollars ($100.00) in cash from one Abraham J. Chasnoff, . . . in exchange for the undertaking of defendant Triano to influence and control the disposition of said criminal action in a manner favorable to James M. Cairns as aforesaid: . . ." There is spelled out in but cursory reading of the accusation the essential elements of the crime of bribery. Moreover, when the elements of the crime of extortion or unlawful takings are superimposed, there is more than a close parallel.

The Second Count complained that the Defendant, unlawfully and by color of his office as Deputy Clerk, did receive from Chasnoff a fee and reward in the approxi-

mate amount of One Hundred Dollars in cash, the same not allowed by law for performing his duties. The charge to the Jury quoted the words of the statute, N.J.S.A. 2A:105-1, verbatim, supplemented with the instruction that "A person takes money not due to him in violation of this statute when he receives a fee or reward to which he is not legally entitled by reason of or in connection with his official duties. In this respect, proof of receipt of a knowingly unlawful payment in connection with an officer's duties is enough and furnishes the necessary criminal intent."

The parallel of the terms of the alleged third specific act of misconduct with the terms of the charge pertaining to unlawful takings clearly establishes an identity of issues comprising the same or similar facts which make up both accusations.

A collation of the evidence from the trial notes discloses that the Jury heard testimony from Chasnoff concerning the corrupt bargain as alleged and also testimony from William Flannery, Martin Greenberg, and Thomas St. Pierre, all of the Prosecutor's staff, concerning the monitoring electronically of conversations between the Defendant and Chasnoff arranging the allegedly illegal undertaking and the consummation of same. Moreover, the Jury heard relevant portions of two tape recordings of the conversations which had been monitored. There was also received into evidence currency in the form of a one hundred dollar bill, accompanied by testimony that the bill had been marked. There was testimony that the marked bill had been supplied to Chasnoff, given by him to the Defendant, and then was retrieved from a safe, located proximate to Defendant's desk in the office of the Clerk of the District Court, coincident with his arrest.

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The canvass of the record in the form of the court's trial notes, the Indictment, the charge, as well as a consideration of "all of the circumstances of the proceedings," make the conclusion inescapable that there is an identity of issues with the same or similar constituent facts making up both the charge of bribery in the First Count and the first specific alleged act of misconduct in the Third Count. Likewise, the same conclusion is sustained as to the charge of extortion or unlawful takings in the Second Count and the third specific alleged act of misconduct in the Third Count.

Finally, there is left for consideration the second alleged act of misconduct, which asserts that the Defendant, in his capacity as Deputy Clerk, did, "in connection with said criminal action against James M. Cairns, unlawfully and improperly amend and change" a Summons "unlawfully and without authority" from the charge of driving an auto while under the influence of alcohol, N.J.S.A. 39:4-50, to the lesser offense of driving while impaired, N.J.S.A. 39:4-50 (b). Do the accusatory acts fall within the ambit of the first two Counts of the Indictment?

The corrupt bargain which constituted the State's case on the bribery count centered around the alleged undertaking on the part of the Defendant to "obtain a certain disposition of certain charges then pending in the Hudson County District Court against one James M. Cairns, . . . " Likewise, the unlawful takings charge in the Second Count was tried in the context of "a criminal action pending before the Criminal Division of the Hudson County District Court," in the words of that Count. The charges and the criminal action have reference to a Summons No. CA52000, which charged driving while intoxicated, N.J.S.A. 39:4-50, issued to James M. Cairns.

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The evidence adduced by the State directed to establishing the guilt of the Defendant of the charges of bribery and extortion included the evidence summarized *infra* as well as the testimony of Norman R. Sierfeld, patrolman, Hudson County Police, who issued the Summons in question to James M. Cairns; of Margaret Prendergast, formerly Principal Clerk in the District Court, Criminal Part, who described the procedure of the office relating to the processing of complaints, and the method of maintaining the docket book and other controls; of Ordway Hilton, an examiner of questioned documents, otherwise described as a handwriting expert. The handwriting expert testified concerning the revision or amendment of the Summons by the inscribing of the letter "b" to the original statutory designation N.J.S.A. 39:4-50. After comparing the Summons with known specimens of Defendant's handwriting, Mr. Hilton was unable to testify that the "b" was in the hand of Defendant, but at the same time he could not exclude the Defendant as the scrivener.

The State also called Edward Burke, Inspector, Hudson County Police, who testified about the procedure in processing a summons; he said he did not recall getting a call to have the arresting officers appear in the District Court on the date of the scheduled hearing.

The Defendant did not testify, but among witnesses called on his case was Judge John J. McCole of the Hudson County District Court. On cross-examination, Judge McCole testified that the Deputy Clerk does not have authority to alter a traffic summons; that he, Judge McCole, had not approved of the amendment of the letter "b" to the traffic summons in question, and that he would not accept a plea of guilty to a lesser offense in the absence of the police officers concern.

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A content analysis of the evidence adduced by the State, both quantitatively and otherwise, directed to the counts of bribery and unlawful takings, distinctly put in issue the allegation that Defendant Triano unlawfully and improperly amended the summons. Indeed, it could be said that the unlawful tampering of the Summons, and the allegedly unlawful manner in which the Summons was processed by the Defendant, constituted the core of the State's case. The accusatory act of tampering with the summons formed an integral part and necessary ingredient of the offenses charged, and supplied a *quid pro quo* of the alleged bribe and extortion. On those charges the Defendant was exonerated.

Where the "fact prosecuted" is the same in several counts of an indictment, though the offenses differ in coloring and degree, and the Defendant is acquitted as to one or more counts, but there is disagreement on another count, there is prior jeopardy. So it is that collateral estoppel does not require an identity of offenses, associated with the classic definition of double jeopardy, but rather a congruence of "facts prosecuted." See *State* v. *Leo Proulx,* 263 A. 2d 673, 675 (S. Ct. N. H. 1970).

This decision rests upon the doctrine of collateral estoppel, defined by Mr. Justice Wachenfeld in these words: "The doctrine of collateral estoppel . . . precludes the relitigation between the same parties of the identical factual question previously tried between them, where it is isolated and determinative of the basic factual issue involved. *Restatement, Judgments,* Sec. 68; See *Mazilli* v. *Accident & Cas. Ins. Co.,* 26 N. J. 307 (1958). It applies in criminal as well as in civil cases." *State* v. *Emery,* 27 N. J. 348, 359 (1958), also noted in *State* v. *Bell,* 55 N. J.

239, 245-246 (1970). However variously the doctrines of double jeopardy, *res judicata* and collateral estoppel may be defined, the principle is fundamental that when a question of fact or law has been distinctly put in issue and a verdict rendered thereon, such question of fact or law may not afterwards be relitigated. See *State* v. *Cormier, supra,* 46 N. J. 494, 505 (1966).

Counsel for the State candidly stated during argument that the evidence which would be addressed to the Third Count at a second trial would be "substantially the same" as that submitted to the Jury at the prior trial. While the "same evidence" test, as already noted, has been supplanted as being too narrow, today, when "the core of the prosecutor's case," would be the same in a subsequent trial relitigation will not be sanctioned. *Sealfon* v. *United States, supra,* 332 U. S. at 580, 68 S. Ct. at 240, 92 L. Ed. at 185, cited in *State* v. *Cormier, supra,* 46 N. J. at 506-507. See *United States* v. *Kramer,* 289 F. 2d 909 (2 Cir. 1961).

In applying the doctrine of collateral estoppel, the Supreme Court has declared that the rule "is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." *Ashe* v. *Swenson, supra,* 397 U. S. at 444, 90 S. Ct. at 1194, 25 L. Ed. 2d at 475 (1970). The same admonition has been voiced by the Supreme Court of New Jersey in urging that the doctrine not be applied grudgingly: "The broadening policy considerations in favor of safeguarding individual rights of defendants and the need for conserving public energies as well as public funds, strongly suggest that where, as here, a jury has considered and rejected the State's contention in favor of the

defendant's contention on the issue submitted as the crucial one, the matter should be permitted to rest in its entirety." *State* v. *Cormier, supra*, 46 N. J. 494, 509 (1966). Similar considerations were advanced by the Court in *State* v. *Bell, supra*, 55 N. J. at 246: "The State has sufficient resources to prepare its case thoroughly at the first trial and considerations of individual rights of defendants and of public expense and energy demand that a matter should be finally put to rest at some point in time."

This court adopts the rationale of Mr. Justice Heher, writing in *State* v. *DiGiosia*, 3 N. J. 413, 421 (1950): "The responsibility for the acquittal is the Jury's. A miscarriage of justice by a jury on the trial of an indictment is not correctible by another prosecution of the indictment or by a trial of a new indictment for the same offense. Such occasional failures of justice are outweighed by the general personal security afforded by the great principle of freedom from double jeopardy. Such misadventures are the price of individual protection against arbitrary power."

The motion of the defendant to dismiss the Third Count of the Indictment on the grounds of collateral estoppel is granted. An appropriate order may be submitted.

APPENDIX B

Opinion of the Superior Court of New Jersey Appellate Division A-1535-72

(Filed—February 21, 1974)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION—A-1535-72

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

JOSEPH A. TRIANO,

Defendant-Respondent.

Argued February 4, 1974—Decided February 21, 1974.

Before Judges LEONARD, ALLCORN and CRAHAY.

On appeal from Hudson County Court, Law Division.

Mr. Edwin H. Stern, First Assistsant Prosecutor, argued the cause for appellant (*Mr. Geoffrey Gaulkin,* Hudson County Prosecutor, attorney; *Mr. Richard Abramson,* Legal Assistant, on the brief.)

Mr. Gerald Miller argued the cause for respondent (*Messrs. Miller, Hochman, Myerson & Miller,* attorneys).

Appendix B

The opinion of the court was delivered by
LEONARD, P.J.A.D.

The State appeals from a final judgment dismissing the third count of an indictment returned against defendant.

In a three count indictment defendant was charged with (1) bribery, (2) unlawful taking of a fee and (3) misconduct in office. The basis of the indictment was that defendant, as Clerk of the Criminal Division of the Hudson County District Court, accepted $100 to reduce a charge pending in that Court against one Cairns for operating an automobile while under the influence of intoxicating liquor (N.J.S.A. 39:4-50(a)) to one of operating said vehicle while impaired (N.J.S.A. 39:4-50(b)) and that he unlawfully altered the original summons issued to Cairns to allege a violation of the lesser offense.

Following a 17-day trial, the jury acquitted defendant on the first and second counts of the indictment. However, it was unable to reach a verdict on the third count and a mistrial was declared as to that charge.

Thereafter, defendant moved for a dismissal of the third count. Following a hearing, the trial judge, in a written opinion, dismissed that count on the grounds of collateral estoppel and an appropriate judgment was entered.

We reverse. It is our opinion that collateral estoppel does not preclude defendant's retrial on the third count of the indictment. *State* v. *Roller*, 29 N. J. 539 (1959). Here the State was not engaging in unfair *plural* attempts to convict defendant for a single offense. Rather, following the discharge of the jury by reason of the fact that

it could not agree upon a verdict as to one count of a multiple count indictment, the State was merely seeking to obtain a determination in the *same trial* on the charge preferred under that count. Thus, the acquittal under the first two counts in nowise bars the continuance of the trial on the third count of the indictment. *Id.* at 349-50.

Defendant's contention that *State* v. *Roller, supra,* is not applicable because the dismissal of the pertinent indictment therein was by the trial judge and not by jury resolution, is without merit. The Court in *Roller* notes and adopts the trial court's view that the dismissal was "equivalent to a judgment of acquittal" (at p. 343).

State v. *Cormier,* 46 N. J. 494 (1966), upon which defendant relies, is inapposite. That case involved a subsequent trial upon a second indictment charging a substantive offense following a trial resulting in an acquittal upon a separate indictment which solely charged a conspiracy to commit the same offense. Thus, therein there were two separate trials upon two distinct indictments. Here, as above noted, there was but one trial upon a multiple count indictment.

Finally, defendant cites *Cosgrove* v. *United States,* 224 F. 2d 146 (9th Cir. 1955); *United States* v. *Flowers,* 255 F. Supp. 485 (E. D. N. C. 1966) and *Oliver* v. *Superior Court,* 267 P. 764 (Dist. Ct. Cal. 1928), which hold contrary to our determination herein. We do not consider these cases to be binding upon us.

Accordingly, the dismissal of the third count of the indictment is reversed and the matter is remanded to the trial court for a plenary trial thereon.

APPENDIX C

Order of the Supreme Court of New Jersey Denying Certification

SUPREME COURT OF NEW JERSEY
C-527 SEPTEMBER 1973

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

JOSEPH A. TRIANO,

Defendant-Appellant.

This matter having been duly presented to the Court, it is ORDERED that the appeal is dismissed pursuant to Rule 2:11-9.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 30th day of April, 1974.

FILED

Apr. 30, 1974
FLORENCE R. PESKOE
Clerk

FLORENCE R. PESKOE
Clerk

A TRUE COPY

FLORENCE R. PESKOE
Clerk

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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 73-1887

JOSEPH A. TRIANO,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for Writ of Certiorari to the Appellate Division of the Superior Court of New Jersey

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Counter-Statement of Matter Involved

Pursuant to Supreme Court Rule 40-3, Respondent, State of New Jersey respectfully submits the following additions and corrections to Petitioner's Statement of the Matter Involved.

On June 16, 1971, Chasnoff contacted the Hudson County District Court Clerk's Office, entered his appearance as counsel for Cairns and asked for an adjournment of the case from the scheduled June 18, 1971 hearing date. (1T4-18 to 1T5-2). On this date Chasnoff examined Cairns' copy of the drunk driving summons and discerned that the statute described thereon was N.J.S.A. 39:4-50. (1T7-19 to 1T8-11).

On November 5, 1971, Triano called Chasnoff and arranged a meeting at which Triano told Chasnoff that he had convinced the police officers to downgrade the case from an "a" offense (driving while under the influence) to the lesser offense of "b" (driving while impaired). Triano also told Chasnoff he would have to "bag" the officers $50 a piece so that they would not appear in court, and the case would "go through" as a "b". (1T23-3 to 1T 26-11). Chasnoff indicated, albeit reluctantly, that he would go along with the suggestion but that he needed time to get the money. (1T26-18 to 20).

Subsequent to the above conversation, Chasnoff went to the chambers of the Honorable Samuel A. Larner, Assignment Judge of Hudson County, and revealed to the judge the offer made by Triano. (1T35-7 to 11). Chasnoff was then taken to meet with investigators of the Hudson County Prosecutor's Office. (1T38-4 to 1T40-15).

Pursuant to the investigators' instructions, on November 15 Chasnoff called Triano from a telephone at the Prosecutor's Office. During this conversation, which was taped and transcribed, a hearing date, November 24, was fixed. Triano also told Chasnoff the probable fine that would be imposed, that the passage of money would be as previously instructed, and that the arresting officers would not appear at the hearing. (1T42-24 to 1T44-8; 1T46-7 to 1T47-8).

The next encounter between Triano and Chasnoff took place on November 24. At this time, Triano showed Chasnoff a copy of the drunk driving summons, and pointed out that the letter "b" had been added to the summons. (1T58-19 to 1T59-14).

Except for the above additions, it appears Petitioner's account of Chasnoff's testimony is essentially accurate and complete. Moreover, Petitioner's account of the testimony of other State witnesses is accurate, with the exception of the following.

Detective Flannery, who took part in the arrest of Triano, was not sure of the identity of other papers and envelopes among which the $100 bill and Cairns' summons was found. (5T106-20 to 5T108-25).

Ordway Hilton, a handwriting specialist, in addition to stating that he could not determine who added the letter "b" to the summons in question, testified that the letter "b" following the statutory notation on the drunk driving summons was written with a different pen and ink than the statutory notation, and was added at a different time. (9T92-12 to 17; 9T96-1 to 4).

Contrary to Petitioner's interpretation, nothing in the testimony of Judge McCole contradicted the testimony of Chasnoff as to the latter's conversations and dealings with Triano. Judge McCole also testified that the duties of the Deputy Clerk of the District Court do not involve downgrading discussions. (11T71-25 to 11T72-6).

In the course of its charge to the jury the court read the indictment verbatim (11T168-1 to 11T171-14), and explained that the defendant was tried upon the counts noted therein. (11T171-18 to 24). The court then read the three statutes under which the defendant was charged in each count. (11T172-7 to 11T173-9). The court explained

the elements of each of the crimes charged, stating that it was these elements that the State was required to prove beyond a reasonable doubt. (11T173-17 to 11T179-25).

Significantly, for purposes of this case, the trial court instructed the jury on the bribery charge that:

> "A necessary element for the State to prove beyond a reasonable doubt in order to establish the crime of bribery is a guilty intent or criminal intent on the part of the defendant. Such necessary criminal intent on the part of the defendant means an intent to use the opportunity to perform a public duty as a means of acquiring an unlawful personal benefit or advantage." (11T173-18 to 25).

As to extortion, the court charged that to convict the jury must find that the defendant received the money as a "fee or reward." (11T176-1 to 2). Finally, the court told the jury that to find defendant guilty of misconduct in office it must find that he acted improperly in office but that,

> ". . . it is not necessary however for the State to adduce proofs from which it could be inferred that the defendant intended to profit from the acts alleged to have been done by the defendant or omitted by the defendant." (11T179-21 to 25).

Aside from hearing the taped conversations, the jury was permitted to see the marked $100 bill which was received in evidence. The jury was also provided the original drunk driving summons (as altered) and a copy of the original summons in unaltered form.

REASONS FOR DENYING CERTIORARI

The Superior Court of New Jersey, Appellate Division correctly decided collateral estoppel does not apply under these circumstances.

Petitioner virtually assumes that the doctrine of collateral estoppel as espoused in *Ashe* v. *Swenson*, 397 U.S. 436 (1970), may operate as a bar to retrial where the jury in a multiple count indictment case acquitted the defendant on some counts but could not reach a decision on others.[1] The bulk of the Petition involves a factual analysis of the proceeding below and concludes that reprosecution is barred because the jury below determined facts in Petitioner's favor which must by necessity be relitigated on the retrial. With this proposition the State disagrees. If collateral estoppel applies, and a determination as to what facts were ultimately decided in defendant's favor can be made, it is submitted that such facts need not be, and will not be, introduced upon a retrial of the misconduct in office charge. See, *infra*. However, inasmuch as the Superior Court of New Jersey, Appellate Division, found that the doctrine does not apply, it is the issue of the applicability of collateral estoppel in this case upon which certiorari must be granted or denied. Thus, this response is primarily concerned with an examination of that issue.

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[1] Petitioner does not argue, nor on the basis of this record can he argue, that retrial is barred by traditional double jeopardy principles because there was no "manifest necessity" for dismissal of the jury for failure to reach a verdict. See *United States* v. *Perez*, 9 Wheat. 579 (1824); *Downum* v. *United States*, 373 U. S. 734, 736 (1963). The jurors deliberated on the third count for the better part of two days and, after being given every opportunity to reconcile their differences, reported they were hopelessly deadlocked. See *United States* v. *Logan*, 144 U. S. 263 (1892).

It is the position of the State of New Jersey that an analysis of collateral estoppel as set forth in *Ashe* reveals that the doctrine was never meant to apply to the situation now before this Court. The holding of the Superior Court of New Jersey, Appellate Division, that retrial under this set of facts merely constitutes a continuation of the first trial, and thus collateral estoppel does not apply, was simply a shorthand method of stating that the doctrine is not offended by such action. That this is the sense of the opinion is apparent from a reading of *State* v. *Roller*, 29 N.J. 339, 149 A.2d 238 (1959), relied upon by the Appellate Division. That case held in essence that neither the policies of double jeopardy nor collateral estoppel require that reprosecution be barred where a single jury acquitted and "hung" on separate counts of an indictment. In any event, whether retrial here is considered a continuation of the first trial or a separate proceeding, it is evident that collateral estoppel does not apply.

In *Ashe* v. *Swenson, supra*, this Court held that the doctrine of collateral estoppel was embodied in the Fifth Amendment guarantee against double jeopardy. Thus, under the authority of *Benton* v. *Maryland*, 395 U.S. 784 (1969), the collateral estoppel principle as expressed in *Ashe* is binding upon the states. In its broadest terms the doctrine provides "that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in a future lawsuit." *Ashe* v. *Swenson, supra* at 443.

Prior to *Ashe*, collateral estoppel had long applied to criminal cases in the federal courts. *United States* v. *Oppenheimer*, 242 U.S. 85 (1916). On a constitutional level, however, a defendant was protected by the guarantee against double jeopardy which, unlike collateral estoppel, bars reprosecution only where there is an identity of of-

fenses. As a determinant of what constituted identical offenses or the "same offense" the judiciary generally adopted the so-called "same evidence" test whereby an acquittal on a first indictment does not bar a second indictment unless proof of the facts contained in the latter would sustain a conviction in the former. See *Blockburger* v. *United States,* 284 U.S. 299, 304 (1934).

The policies and purposes behind the traditional double jeopardy guarantee are well defined. See, *e.g., United States* v. *Jorn,* 400 U.S. 470, 479-480 (1971); *Green* v. *United States,* 355 U.S. 184 (1957). Essentially, the State, with all its power and resources, should not be permitted to make several attempts to convict a defendant for an alleged criminal act. Successive prosecutions cause the defendant expense, embarrassment, ordeal, anxiety and the insecurity of knowing that the end of one trial may not be the end of his troubles. *Green* v. *United States, supra,* at 187-190; Comment, "Criminal Procedure—Double Jeopardy —Trial Courts Granted Broad Discretion to Determine 'Manifest Necessity' for Mistrial." 26 *Rut.L.Rev.* 683, 684 (1973). Moreover, the State ought not to be allowed to retry a defendant with a view toward finding the right set of facts which will produce a conviction. *North Carolina* v. *Pearce,* 395 U.S. 711, 734 (1969) (Justice Douglas, concurring); "Collateral Estoppel Is Constitutionally Required In Criminal Cases Because It Is Embodied In the Fifth Amendment Double Jeopardy Clause—*Ashe* v. *Swenson,*" 69 *Mich.L.Rev.* 762, 767 (1971). Nor should the State be free to employ the criminal process as a means of harassment of an individual. *North Carolina* v. *Pearce, supra* at 733 (Justice Douglas, concurring); Note, *supra,* 69 *Mich. L.Rev.* at 767.

At common law and during the early statutory development of the criminal law, the double jeopardy principle

provided an accused with adequate protection against the abuses outlined above. See Note, *supra,* 69 *Mich.L.Rev.;* Comment, "Statutory Implementation of Double Jeopardy Clauses: New Life for a Moribound Constitutional Guarantee", 65 *Yale L.J.* 339, 341-343 (1956). The evolution of the criminal law, however, stripped the doctrine of much of its utility. The increased number of statutes under which a single criminal act may be prosecuted opened the defendant to multiple prosecutions for an essentially unitary criminal episode. In light of the differing shades of criminality covered in these statutes, the "same evidence" test was of little aid to the harried defendant. See Note, "Double Jeopardy and the Multiple Count Indictment," 57 *Yale L.J.* 132, 133 (1947). This development, among others, exposed the guarantee against double jeopardy as a doctrine of limited protective value.

Recognizing the need to breathe new vitality into a collapsing principle, the federal courts (see e.g., *Sealfon* v. *United States,* 332 U.S. 575 (1948)), and many other jurisdictions, including New Jersey (see *e.g., State* v. *Cormier,* 46 N.J. 494, 218 A. 2d 138 (1966)), applied collateral estoppel to criminal cases. And, it is clear the doctrine is well-suited to accomplish its purpose.

The basic policy considerations of collateral estoppel, when it is applied to criminal cases, are virtually identical to the objectives of the traditional double jeopardy rule barring reprosecutions after acquittal. It is intended to protect an individual from harassment, embarassment, anxiety etc. See Meyers and Yarbrough, "Bix Vexari: New Trials and Successive Prosecutions," 74 *Harv.L.Rev.* 1, 32-33 (1960). The principle, while identical in purpose, applies to situations not covered by the traditional double jeopardy guarantee, but rife with the very abuses which the latter doctrine was meant to eliminate.

It was from this background and the then recent holding of *Benton* v. *Maryland, supra,* that the *Ashe* rule grew.[2] 397 U.S. 443 n. 10. And, viewed in this context it is difficult to see how it can be said collateral estoppel as a constitutional doctrine can apply to the case at bar. Under these circumstances in no sense is there any harassment or oppression or multiple prosecution which the *Ashe* Court found repugnant. On the contrary, the State, in good faith, prosecuted its charges in a single trial. A retrial would entail no more embarrassment, expense or ordeal for the defendant than would exist on a retrial on a single count indictment where the jury disagrees—a thoroughly proper procedure. *United States* v. *Perez,* 9 Wheat. 579 (1824); see *Downum* v. *United States,* 372 U.S. 734, 736 (1963). Yet, the State's vital interest in enforcing the criminal laws would be severely impaired by barring reprosecution.

Independent of the compelling policy considerations against application of the principle at all, it is apparent the doctrine of collateral estoppel has no practical application where, as Petitioner characterizes this case, in a single trial a jury has inconsistently acquitted on one count but "hung" on another and the State seeks to retry the defendant on the latter count. In determining whether the doctrine operates as a bar, *Ashe* requires:

> ". . . [A] court 'to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the

[2] Prior to *Benton* the question of whether collateral estoppel was constitutionally based was purely academic. 397 U. S. 443 n. 10.

> defendant seeks to foreclose from consideration.' The inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.'" (footnotes and citations omitted) 397 U.S. at 443.

Clearly, application of this standard cannot lead to a determination where jurors, or at least some of them, have been inconsistent in their verdicts. This inconsistency must be considered as part of the practical framework of the proceedings. The most that can be said in such cases is that the verdict shows that either in the acquittal or the disagreement the jury did not speak its real conclusions. See *Dunn* v. *United States*, 284 U.S. 390, 394 (1932); *Steckler* v. *United States*, 7 F.2d 59, 60 (2 Cir. 1925). There is no reason to conclude that the misstatement is to be found in the deadlock rather than in the acquittal. A determination as to what was resolved in these circumstances would involve pure speculation, a process not embodied in the *Ashe* test for determining what was ultimately determined in the first trial. Even if collateral estoppel applies in theory to this proceeding, in practice it can never bar retrial. Thus, the very inconsistency which Petitioner argues bars a retrial in this case, in fact, compels a contrary conclusion. Moreover, it is of no moment that the Appellate Division below held the doctrine inapplicable to the case at bar for the ultimate result is identical.

Significantly, the only federal case to expressly discuss the problems inherent in determining what facts were decided for collateral estoppel purposes where a jury rendered inconsistent verdicts, found the above reasoning to be sound. *United States* v. *Flowers*, 255 F.Supp. 485 (E.D.N.C. 1966). While other federal cases have applied

collateral estoppel to the present circumstances,[3] those decisions assumed the jury was rational in the acquittal rather than in the deadlock, without discussion or explanation. See *Green* v. *United States*, 426 F.2d 661 (D. C. Cir. 1970); *United States* v. *Davis*, 369 F.2d 775 (4 Cir. 1966), *cert.* denied 386 U.S. 909 (1967); *Travers* v. *United States*, 335 F.2d 128 (3 Cir.), *cert.* denied 352 U.S. 894 (1956); *Cosgrove* v. *United States*, 224 F. 2d 146 (9 Cir. 1954); *United States* v. *Armco Steel Corp.*, 252 F. Supp. 364 (S.D. Cal. 1966); *United States* v. *Perrone*, 161 F. Supp. 252 (S.D.N.Y. 1958). Thus, these cases shed little light on the issue herein.

In *Flowers* a jury found defendant not guilty on 13 counts of an indictment but could not agree on 13 other counts. The court found that "the authorities, though few in number, and albeit *sub silentio*, uniformly support the application of the collateral estoppel principle to the situation where . . . the jurors have acquitted on some counts and have been unable to reach a verdict on others. [the court cited most of the above authorities]." 255 F. Supp. at 488. Unfortunately, and indeed wrongly, it felt bound by this authority. In dicta, however, the district court noted that, were the question open, it would be "hesitant to apply the collateral estoppel principle in the case at bar." *Id.* It made this observation upon analysis of the cases of *Sealfon* v. *United States*, *supra* (which applied collateral estoppel to successive criminal trials) and *Dunn* v. *United States*, *supra* (which held that inconsistent verdicts were permissible in criminal cases). The court reasoned:

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[3] It is noteworthy that in so applying collateral estoppel none of these cases analyzed the purpose of the doctrine, nor the basis of its application.

> "In the context of a situation such as that presented here, *i.e.*, a verdict of acquittal on some counts coupled with the jury's inability to reach a verdict on other counts, the application of the *Sealfon* rationale requires the court to assume that the jurors have been logical in reaching their decision on the acquitted counts, yet the ultimate result will often be a conclusion that the jurors, or some of them, were illogical and inconsistent in failing to acquit on the remaining counts. In short, upon the instant facts, the jury must be assumed to be logical in order to conclude that it has been illogical, an unfortunate dichotomy to say the least. The *Dunn* rationale, on the other hand, takes cognizance of the seemingly inevitable vagaries of jurors and would be, in my opinion based upon practical experience, a sound approach to the problem presented here. It has long been recognized that jurors often do not see the facts as the court does, nor do they always follow the judge's instructions to the letter. See *United States* v. *Dotterweich*, 320 U.S. 277, 279, 64 S. Ct. 134, 88 L.Ed. 48 (1943); *Dunn* v. *United States, supra*, 284 U.S. at 394, 52 S.Ct. 189; *Horning* v. *District of Columbia*, 254 U. S. 135, 138, 41 S.Ct. 53, 65 L. Ed. 185 (1920)." *Id.* at 488.

Furthermore, while not involving the same procedural setting as in *Flowers* and the case at bar, the case of *United States v. Maybury*, 274 F. 2d 899 (2 Cir. 1960), is instructive. There the defendant was charged in a two-count indictment with forgery and uttering a forged check. He was tried before a district judge, waiving a jury trial, and acquitted on the forgery count but convicted as to uttering. In the course of rendering his verdict the trial

judge made statements inconsistent with his acquittal on the first count. The Circuit Court reversed on the basis of inconsistent verdicts, finding that *Dunn* v. *United States, supra,* did not apply to a non-jury trial. *Id.* at 902-903.

Having reversed the conviction, the court confronted the consequences of its holding. Two judges, significantly Judge Friendly, the author of *United States* v. *Kramer,* 289 F.2d 909 (2 Cir. 1961), cited with approval in *Ashe* at 443 and Judge Hand, held that Maybury could be retired on the uttering count. *Id.* at 904. Judge Friendly ruled that the doctrine of *res judicata* as espoused in *Oppenheimer* and *Sealfon* did not apply to the facts of the case at bar. He noted that he could find no case "where the doctrine has been applied to acquittal on one count of a multiple count indictment when the defendant has successfully appealed conviction on another count of the same indictment, and certainly not where the very ground of appeal was that the acquittal and the conviction cannot stand together." *Id.* at 905. Aside from the lack of authority, Judge Friendly reasoned that were retrial barred under these circumstances, the rule must apply to jury verdicts as well. Thus, he noted, in cases like *Dunn* there could have been no reprosecution if there had been other grounds for reversal on the counts on which the defendant was convicted, a result clearly not contemplated by *Dunn.* And, Judge Friendly added, it is difficult to see how the *Dunn* result itself could be defended.[4] *Id.* at 905. Judge Friendly concluded:

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[4] It cannot be reasonably contended that *Ashe* in any manner eroded the basis of *Dunn.* The rationale of *Dunn,* which recognizes the vagaries of juries, is so deeply ingrained in our criminal jurisprudence, see *United States* v. *Maybury, supra* at 902-903, that it is difficult to imagine this Court disapproving that

(Footnote continued on following page)

> "The government's inability to appeal an acquittal on one count in a criminal case should not render this *res judicata* where the defendant has successfully appealed a conviction on another count, at least when the appeal was for inconsistency." *Id.* at 905.

In analyzing *Maybury* it is apparent that the same result as to the collateral estoppel issue would have been reached had there been a mistrial declared as to the uttering count. In essence, the alleged inconsistency between the verdicts herein and the inconsistency in the trial result in *Maybury* give rise to a possible collateral estoppel claim. The same considerations therefore apply.[5]

It is recognized that the reasoning of *Flowers* and *Maybury* would only support a rule that reprosecution cannot be barred by collateral estoppel where a jury simultaneously acquits and fails to reach a verdict on separate counts in circumstances under which such action is logically irreconcilable. Where on examination of the proceed-

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(Footnote continued from preceding page)

reasoning without so much as a reference in a footnote. *Ashe* simply held that where a jury is rational on the face of the result, collateral estoppel may apply. More importantly, as noted in the text, *Ashe* was concerned with governmental abuses in plural prosecutions, whereas *Dunn* was concerned only with a single trial.

[5] It is noteworthy that both *Flowers* and *Maybury* held that collateral estoppel does not apply, rather than that it cannot bar retrial. Apparently, both courts felt that if the doctrine had no practical application, it could not operate in theory. However, as noted in the text, the same result is reached whether or not the doctrine applies.

ings there is a rational explanation for differing verdicts, application of the *Ashe* test for ascertaining which facts were determined in defendant's favor will lead to a conclusion. While a retrial is permissible, collateral estoppel may preclude production of the facts so determined. This, of course, assumes collateral estoppel is in part an evidentiary doctrine, a theory open to some question. Compare, *Wingate* v. *Wainwright*, 464 F.2d 209 (5 Cir. 1972) and *United States* v. *Kills Plenty*, 466 F.2d 240 (8 Cir. 1972), *cert.* denied 410 U.S. 916 (1973). That issue, however, is of no moment here for two reasons.

First, as previously noted, strong policy considerations militate against the application of the doctrine in all respects where the government has attempted to prosecute its charges in a single trial. Second, while Petitioner would disagree, no facts determined in his favor in this proceeding need be or will be produced at retrial on the misconduct in office charge. As recounted in the Counter-Statement of the Matter Involved, the trial court instructed the jury to acquit defendant as to bribery if it found defendant did not intend to receive any personal gain from the illicit deal. As to extortion, the jury was instructed to acquit if he received no "fee or reward."[6] On the other hand, the jury was expressly charged that defendant need not have intended to profit in order to return a guilty verdict on the misconduct count.

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[6] It is noted that the trial court's instruction in this respect was erroneous. Personal gain is an element of neither bribery nor extortion. See *State* v. *Begyn*, 34 N. J. 35, 167 A. 2d 161 (1961). However, unless this error prejudiced the defendant, which by putting a greater burden upon the State it obviously did not, it is of no relevance for purposes of determining which facts a jury decided in defendant's favor.

It is apparent that under this charge the jury could well have acquitted the defendant on the bribery and extortion counts but disagreed as to the misconduct charge because they unanimously believed Triano was acting as a conduit for the police officers, rather than for his own personal reward. Indeed, the evidence would appear to have made out a case consistent with this theory. The State never produced testimony as to whether Triano intended to reap the benefit of the illicit deal. Moreover, Chasnoff's testimony was that Triano told him the money was for the arresting officers. Yet, the entire State's case was substantially uncontradicted.

Thus, on the basis of the proceedings below, it is apparent that the jury decided in defendant's favor only on the issue of his personal gain. That fact is unnecessary to prove misconduct in office. *State* v. *Begyn*, 34 N. J. 35, 167 A. 2d 161 (1961). Indeed, since the State produced no evidence of personal gain below, it presumably will not do so on the retrial. Thus, for purposes of enforcing the criminal law in this case, the State would not be hindered by the application of collateral estoppel as a rule of evidence.

It is believed, however, the better reasoned approach to the issue and the resolution compelled by *Ashe* is simply that collateral estoppel does not apply where, as here, none of the abuses that doctrine was meant to eliminate are present. The means employed by the Appellate Division below to reach this result was to view the retrial as part of the original proceeding. In view of the limited circumstances in which this theory is applied, it is not offensive to the Constitution and, as a matter of state law, should be permitted to stand.

CONCLUSION

For all the foregoing reasons, respondent, State of New Jersey, respectfully prays that the writ of certiorari sought in the above named petition pending before this Court not issue.

Respectfully submitted,

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